UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

E.W. HOWELL CO., LLC

and Case 29-CA-195626

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, NORTHEAST REGIONAL COUNCIL OF CARPENTERS

E.W. HOWELL CO., LLC'S RESPONSE TO OPPOSITION TO PETITION TO REVOKE AND OBJECTIONS TO SUBPOENA *DUCES TECUM* AND SUBPOENA

E.W. Howell Co., LLC ("EWH"), by and through its undersigned attorneys, submits this Response to the Counsel for the Region's Opposition to the Employer's Petition to Revoke Subpoenas ("Opposition"), received on July 21, 2017, and in further support of the Petition[1] seeking revocation of the Board Subpoenas. Further, and as already fully set forth in the Petition, EWH reasserts its objections to each and every one of the Requests, as nothing in the Opposition justifies the Requests, despite and in light of its (i) disproportionate length, (ii) heavy citation to basic, as well as easily distinguishable and inapposite authority, (iii) overwrought investigatory theories, and (iv) unavailable and baseless legal claims. As even a cursory review of the Charge reveals, the Requests seek unnecessary information which, even assuming *arguendo* relevance to the Charge, impose an unreasonable burden on EWH without contributing to the clear development of facts related to the issues and claims underlying the Charge.

[1] Unless otherwise specified herein, the abbreviations and defined terms used herein are intended by EWH to have the identical meaning and reference to those same abbreviations and defined terms contained within the Petition.

THE REQUESTS UNDERSCORE AND COMPOUND THE REGION'S OVERBOARD INVESTIGATION

As the Region repeatedly confesses in the Opposition, the Requests were drawn to match the Region's overbroad investigation—none of which are congruent with the allegations underlying the Charge (*see* Exhibit E).[2] Plainly, the Region has attempted to invent logical justifications for the Requests, most of which are far afield from the real, pertinent, applicable and legitimate legal and factual issues presented by the Charge.

Virtually all of the information within the Requests would serve no purpose other than to create irrelevant facts and issues, none of which pertain to the Charge, especially in light of what has already been provided to the Region by EWH over these past four (4) months. Such clear and uncontroverted information demonstrates, among other things, (i) that EWH does not have a unit of Long Island Carpenters, (ii) that EWH has not had a unit of Long Island Carpenters in at least 16 months, (iii) that EWH has no need for Long Island Carpenters, (iv) that EWH has not violated any provisions of any agreement with the NRCC, and (v) that EWH has not treated Messrs. Alves and Lopes in any discriminatory or retaliatory manner. That the Region refuses to be guided in its ongoing investigation by the clear, credible and obvious facts and, instead, endeavors at all costs, and considerable burden to EWH, to manufacture artificial issues through burdensome "discovery" should both be obvious and stopped.

Without belaboring this point any further, there is no compelling reason to require EWH to provide voluminous payroll records, contracts, or subcontracts relating to any employees outside the sole and exclusive geographical jurisdiction of the NRCC. The Region's requiring EWH to prove the absence of evidence or otherwise suggest by implication, if not directly, that EWH has

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[2] Unless otherwise indicated, references to any exhibits in this Response are to those previously within the Opposition, *i.e.*, Exhibits A-I.

not already provided the relevant scope of documents in its significant previous submissions to the Board (*see* Exhibit D, Exh. 13-16 thereto; Exhibit H.) is a bad faith attempt to overburden and prejudice EWH. The Charge does not at all implicate, nor of course should it, any claims, issues or allegations of joint-employer or unlawful double breasting. Accordingly, and for other reasons, and despite the Region's most ardent and stubborn attempts to find evidence of unlawful activity by EWH, none of EWH's work, carpentry or other, in any jurisdiction outside of Long Island should have any bearing on the Region's investigation related to the Charge.

THE REGION MISCONSTRUES EWH'S KEY DEFENSES AND POSITIONS

EWH hereby addresses the Region's arguments in support of the Subpoenas as articulated in its Opposition[3], which in addition to self-servingly positing that the Requests are tailored to the Region's investigation, states the Requests are also in response to EWH's defenses to the Charge.

Rather than a "stable one-person bargaining unit", EWH has at all relevant times, for the past 16 months, maintained a *zero*-person bargaining unit, which underscores the fact that it is under no obligation to recognize or bargain with the Union. The Region alleges that EWH's lack of carpenter employees is temporary—without any persuasive evidence in support or, for that matter, without any legitimate reason or basis to question the plan and practice EWH has for its work on Long Island. In fact, the very authority cited and relied upon by the Region serves only to illustrate why the Board in those cases found that the respective employer had an obligation to bargain with the union, despite claiming that it did not have anything more than a stable-one person unit. Specifically, in *Galicks, Inc.*, 354 NLRB 295, 299 (2009), the Board rejected the employer's claim that it had a stable one-person unit, where the employer relied on a 15-month period in which

[3] For the sake of brevity, EWH responds to the Region's arguments without repeating the points and arguments in support of revocation raised in the Petition.

it only employed one employee in the unit. But that determination by the Board was mainly if not solely based on the fact that in an earlier period, the employer had a similar "dry spell" lasting 16 months, which ended, and led to a period in which the same employer employed up to three unit members at a time. The juxtaposition of the employer's hiring spells led the Board to not consider the later and at issue period a permanent adjustment. Similarly, the employer at issue in *SAS Elec. Servs.*, 323 NLRB 1239, 1251-52 (1997) had a similar history of dry spells (as did the employer in *Galicks, Inc.*) and had calculated its purported single-employee unit by omitting improperly classified independent contractors, who really were, by all accounts and relevant factors, additional unit employees.

The above cases are clearly distinguishable. No such history of drastic fluctuations or employee misclassification exists here, as they did in *Galicks, Inc,* and in *SAS Elec. Servs.* While EWH is admittedly and obviously in the construction business, which may be subject to fluctuations, its business model is such that it will not be employing carpenters directly in the foreseeable future, just as it has been clearly advising the Union since at least November 2016 (*see* Exhibit 3, Exhibit 12 thereto) and, in fact, has not employed any Long Island Carpenters, since early-April 2016. As a result, there is no collective bargaining unit precipitating an obligation by EWH to bargain. As the Board in *SAS Electrical Services* directed: "In short, when the employee complement at issue has no 'collective' character, and thereby has no meaningful relationship to the practice and procedure of collective bargaining, it is altogether appropriate for the Board to withhold its statutory . . . unfair labor practice process." *SAS Elec. Servs.,* 232 NLRB at 1251 (*quoting McDaniel Elec.*, 313 NLRB 126, 127 (1993)).

EWH supplied the Region with time sheets for the 11 individuals who did perform carpentry work on Long Island (under EWH's former, discontinued practices) from January 1,

2015 to the present, a time period covering more than 30 months, to demonstrate its work assignment practices for its carpenter employees. Any payroll records, beyond those for these 11 former employees on Long Island, would serve no purpose, other than to perpetuate a fishing expedition, given the time period and jurisdiction at issue in this case. The Region claims that it needs payroll information for individuals other than "Long Island" carpenters because it seeks information "concerning carpenters that transfer in and out of the bargaining unit." (Opposition at 10) Such attempted justification is nonsensical. As stated above, EWH has provided the payroll records for all in-jurisdiction carpenters dating back over 30 months. (*See* Exhibit H.) There is no allegation that anyone other than these identified individuals performed carpentry work on Long Island during any relevant period. Moreover, and despite the considerable efforts by the Region to manufacture a healthy argument in support of the Requests in this regard, whether any of those individuals worked in any other jurisdiction is of no moment to the issue of the unit in *this* jurisdiction. If these individuals did not work on Long Island during the relevant period—as they did not—then any information about where else they may have worked is irrelevant.

This is a plain and simple example of how the *Subpoena Duces Tecum* exceeds the reach of the Charge and just how the investigation has ventured into areas wholly irrelevant to this case. The question is simply whether there is a unit at all on Long Island, and the answer is there isn't one now, hasn't been one for the past 16 months, and will not be one in the future. Whether or not one looks to other jurisdictions, and no matter how badly the Region seemingly wants to find a unit on Long Island, the answer should still be the same, *i.e.,* there is no unit over which to bargain with the Union, over terms and conditions of employment for employees that have not, do not, and will not exist in the employ of EWH on Long Island. There are no allegations, claims or issues where, for instance, the Charge implicates a joint employer relationship or unlawful double

breasting and where, accordingly, there might be a need, for example, to determine whether any wages are owed, whether work has been diverted and/or benefit funds remittances are owed due to employee movement in and out of an employer's unit, from a union company to a nonunion company, owned, operated and/or controlled by a union signatory.

It is also disingenuous for the Region to claim that a "dispute arose during the investigation about whether employee Lopes and Alves were working on Long Island in the summer of 2016." (Opposition at 10.) There is no credible dispute. The cover page of certain remittance reports filed by EWH mistakenly referred to a Long Island location, but the actual fund contributions were clearly earned by Messrs. Alves' and Lopes' work performed in Brooklyn at that time, *i.e.*, outside of the Long Island jurisdiction. The Region cannot dispute that such work took place outside of Long Island. Rather, the Region, apparently, persists with the obviously false information supplied by the Union and, to this end, the pressure being imposed on Messrs. Alves and Lopes by the Union.

The Region further claims that it must review extensive payroll records in order "to examine whether carpenters were hired to replace employees that are alleged to have been unlawfully discharged." (Opposition at 11.) The only carpenters who were alleged to have been discharged are Messrs. Alves and Lopes. The Charge on this point reads: "Since on or about May 5, 2017 [EWH] terminated the employment of Armando Lopes and Antonio Avles [sic] because of their membership in the Northeast Regional Council of Carpenters." (*See* Exhibit E.) To require a production of three years of records from all locations in an attempt to determine whether EWH replaced these individuals only since May 2017 would be to attempt to kill a fly with a sledgehammer. Again, this is nonsensical, burdensome, prejudicial and wholly inappropriate. Moreover, EWH, with its Supplemental Position Statement, submitted on June 27, 2017, *i.e.*, more

than a month ago, has already provided a substantive response to the above-quoted short statement, all of which EWH is confident will remain unimpeached and, moreover, all of its actions with respect to Messrs. Alves and Lopes deemed fully appropriate, legitimate and lawful.

EWH appreciates the Region's willingness to limit its request for all contracts between EWH and subcontractors for the period from January 1, 2015 to the present to only those for carpentry work on Long Island for the same period. Yet, even this pared-down request is still exceptionally and unreasonably broad. EWH has already produced the relevant pages of all subcontracts for carpentry work performed on Long Island from January 2015 to the present. (*See* Exhibit H.) These documents contain clear descriptions of the scope of the work to be performed by the subcontractors at issue. Any additional addenda or attachments to the subcontracts serve no purpose to the investigation into the alleged (i) termination of Messrs. Lopes and Alves by EWH, (ii) subcontracting improprieties by EWH, or (iii) the existence of a bargaining unit at EWH on Long Island.

THE OPPOSITION IS BOTH UNTIMELY AND DEFICIENTLY SERVED

The Opposition was due for filing and service within five (5) business days after receipt of the Petition. *See* NLRB Casehandling Manual 11770.8; NLRB, Operations Memorandum 11-70 (July 26, 2011) ("OM 11-70"). The Petition was served on July 7, 2017 (*see* Exhibit A), making the Opposition due on July 14, 2017, with service required to the petitioner (by email, if possible). Yet the undersigned received no email, and only received by mail a hard copy of the Opposition a full week later, on July 21, 2017, in an envelope that was postmarked July 18, 2017.

Thus, the Region did not comply with the timing and service requirements set forth under 29 C.F.R. § 102.111(b) of the Rules and Regulations of the NLRB.[4] For this procedural reason, in addition to the substantive ones identified above, the Opposition should be disregarded, and the Petition should be granted in its entirety.

Dated: July 28, 2017
New York, New York

Respectfully submitted,

By: _____

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[4] 29 C.F.R. § 102.111(b) instructs, in pertinent part: "In construing this section of the rules, the Board will accept as timely filed any document which is hand delivered to the Board on or before the official closing time of the receiving office on the due date or postmarked on the day before (or earlier than) the due date; documents which are postmarked on or after the due date are untimely. "Postmarking" shall include timely depositing the document with a delivery service that will provide a record showing that the document was tendered to the delivery service in sufficient time for delivery by the due date, but in no event later than the day before the due date."

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2017, a true and correct copy of the above was electronically filed by the undersigned via the Board's E-Filing System, and sent by the undersigned via U.S. First Class Mail to:

Executive Secretary, National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

I hereby certify that on July 28, 2017, a true and correct copy of the above was sent by the undersigned via e-mail to:

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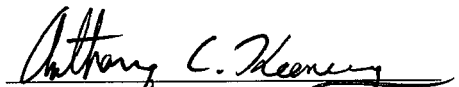

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